UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

IN RE:

MAURICE M. GORGES,

Debtor.

_______________________________/

Case No. 14-59311-tjt
Chapter 13
Hon. Thomas J. Tucker
CORRECTED

NOTICE OF MOTION
THE HUNTINGTON NATIONAL BANK'S MOTION TO SET ASIDE ORDER GRANTING DEBTOR'S REQUEST FOR VOLUNTARY DISMISSAL OF CHAPTER 13 CASE (DOCKET NO. 43)

The Huntington National Bank has filed papers with the Court for an Order Granting The Huntington National Bank's Motion to Set Aside Order Granting Debtors's Request for Voluntary Dismissal of Chapter 13.

Your rights may be affected. **You should read these papers carefully and discuss them with your attorney, if you have one in the bankruptcy case. (If you do not have an attorney, you may wish to consult one.)**

If you do not want the Court to grant the relief as requested, or if you want the Court to consider your views on the motion, within 21 days, or shorter time period if the Court grants expedited relief, you or your attorney must:

1. File with the court a written response or an answer, explaining your position at [1]:

Clerk of the Court
United States Bankruptcy Court
211 W. Fort Street – 21st Floor
Detroit, MI 48226

[1] Objection or request must comply with F.R. Civ. P. 8 (a) (b), (c) and/or (e), as applicable.

If you mail your response to the court for filing, you must mail it early enough so the court will **receive** it on or before the 21 days, or shorter as explained above, period expires.

You must also mail a copy on:

Marc P. Jerabek, Esq.
Plunkett Cooney
38505 Woodward Ave., Ste. 2000
Bloomfield Hills, MI 48304

2. If a response or answer is timely filed and served, the clerk will schedule a hearing on the motion and you will be served with a notice of the date, time and location of the hearing.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting the relief sought.

PLUNKETT COONEY

Dated: March 10, 2015

By: _/s/ Marc P. Jerabek_
Douglas C. Bernstein (P33833)
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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

IN RE:

MAURICE M. GORGES,

Debtor.

Case No. 14-59311-tjt
Chapter 13
Hon. Thomas J. Tucker
CORRECTED

_________________________________/

CERTIFICATE OF SERVICE

I, Marc P. Jerabek, hereby certify that on March 10, 2015, a copy of this motion by The Huntington National Bank, was filed electronically. Notice of this filing will be sent to all parties who have appeared by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. Any party, including Debtor, that has not so appeared, has been sent a copy via regular mail.

/s/ Marc P. Jerabek
Marc P. Jerabek (P61819)
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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

IN RE:

MAURICE M. GORGES,

Debtor.

Case No. 14-59311-tjt
Chapter 13
Hon. Thomas J. Tucker
CORRECTED

_________________________________/

THE HUNTINGTON NATIONAL BANK'S MOTION TO SET ASIDE ORDER GRANTING DEBTOR'S REQUEST FOR VOLUNTARY DISMISSAL OF CHAPTER 13 CASE (DOCKET NO. 43)

The Huntington National Bank ("Huntington"), by its attorneys, Plunkett Cooney, files its Motion to Set Aside Order Granting Debtor's Request for Voluntary Dismissal of Chapter 13 Case (Docket No. 43) (the "Dismissal"), pursuant to Fed. R. Bankr. P. 9023 and 9024, Fed. R. Civ. P. 59(e) and 60(b)(3), and 11 U.S.C. §105(a), and requests that this Court enter an order setting aside the Dismissal, converting the case to one under chapter 7 for the reasons set forth in Huntington's Objection to Trustee's Motion to Dismiss Case (Docket Nos. 40, 41, 44), and awarding sanctions in favor of Huntington and against the Debtor and his counsel. This motion is based upon the following:

INTRODUCTION

1. The proposed order providing the relief sought in this motion is attached as **Exhibit 1**.

2. This bankruptcy case was filed for the sole purpose of delaying an eviction case, where the Debtor, Maurice M. Gorges (the "Debtor") and his wife tendered a consent judgment (the "Consent Judgment") to Huntington, to be held in escrow, for possession of their home at

13248 Maplelawn Drive, Shelby Township, Michigan (the "Real Property"), pursuant to a settlement entered one week prior to the petition date, December 17, 2014.

3. The Debtor's conduct, and upon information and belief, that of his wife and children, demonstrates that this case was filed in bad faith, that the Debtor was seeking to and in fact did abuse the bankruptcy process; thus, if the Dismissal is permitted to stand, Huntington will suffer manifest injustice.

4. This case was the third bankruptcy filing by the Debtor and/or his wife, Hana Gorges ("Mrs. Gorges," together with the Debtor, the "Eviction Defendants") in 25 months.

5. The Eviction Defendants received a chapter 7 discharge on February 20, 2013 (Case No. 12-65140, Docket No. 31, the "Chapter 7").

6. One year after obtaining the discharge of her debts, Mrs. Gorges filed for chapter 13 bankruptcy relief on February 17, 2014 (Case No. 14-42250, the "Hana Gorges Bankruptcy"), *one day before the expiration of the redemption period* after Huntington had foreclosed its mortgage encumbering the Real Property, for the sole purpose of delaying eviction.

7. The Debtor filed this case to further delay the eviction – despite the fact that he granted Huntington the Consent Judgment one week prior to filing this case.

8. On February 27, 2015, Huntington recovered possession of the Real Property and found extensive damage to the Real Property, roughly estimated to exceed $150,000. None of the damage existed at the time Huntington inspected it, concurrent with the execution of the Consent Judgment.

9. Huntington also learned that an estate sale was conducted, apparently selling scheduled property of the bankruptcy estate, one day after the parties appeared before the Court to determine whether the Debtor was entitled to the benefit of an extended time to fulfill the

settlement with Huntington pursuant to 11 U.S.C. §108(b)(2). Previously, the Debtor had sought adjournments of the §341 hearing, for which he never appeared, thus precipitating a motion by the Chapter 13 Trustee to dismiss (Docket No. 37).

10. Upon learning of the extensive damage to the Real Property and the sale of property of the bankruptcy estate, on March 3, 2015, Huntington filed its Objection to Trustee's Motion to Dismiss Case ("Huntington's Objection"). *See*, Docket Nos. 40, 41, 44.

11. *Within hours* of the filing of Huntington's Objection, the Debtor filed his Motion for Voluntary Dismissal of Bankruptcy Case (Docket No. 42). The timing of the Debtor's motion, Huntington submits, was hardly coincidental, but rather was yet another badge of the bad faith and abuse of the bankruptcy process by the Debtor and his counsel, and was filed for the sole purpose of evading any repercussions for the misconduct described in this Motion.

12. The facts and circumstances clearly demonstrate that this case was filed in bad faith, with the purpose of delaying Huntington's eviction and otherwise frustrating the Debtor's creditors and abusing the bankruptcy process, and the Dismissal should be set aside so the case can be converted to one under chapter 7. In addition, the Debtor's counsel should be sanctioned for his integral role in the misconduct and abuse, consistent with the provisions of 28 U.S.C. §1927, as it is yet another example of his conduct which has been the subject of scrutiny by members of this Court and the United States District Court (see, *e.g.*, Order Affirming Bankruptcy Court Orders issued by Senior U.S. District Judge Arthur J. Tarnow on February 23, 2015 in *Casab v. Grand Sky Enterprise Co., Ltd.*, Case No. 14-12270) (Docket No. 8).

THE UNDERLYING LOAN DOCUMENTS, FORECLOSURE COMMENCEMENT IN 2012, AND THE *FIRST* BANKRUPTCY FILING TO DELAY FORECLOSURE

13. On April 13, 2005, non-party Maurice & Hana, Inc., of which the Eviction Defendants were principals, executed promissory notes in the principal amounts of $3,300,000

and $1,800,000 (collectively, the "Notes") in favor of Community Bank of Dearborn. **Exhibit 2**. As a *portion* of the security provided for the Notes, on May 9, 2006, the Eviction Defendants granted a Mortgage (the "Mortgage," together with the Notes and related documents, the "Loan Documents") to Community Bank of Dearborn, encumbering the Real Property they owned in fee simple. **Exhibit 3**. The Loan Documents were subsequently acquired by Huntington from the Federal Deposit Insurance Corporation (the "FDIC"), acting as receiver for Fidelity Bank, f/k/a Community Bank of Dearborn; an Assignment of Mortgage was executed by the FDIC evidencing this assignment and recorded on August 20, 2012, in Liber 21500, Page 581, with the Macomb County Register of Deeds.

14. Maurice & Hana, Inc. defaulted on the Notes and pursuant to the terms of the Loan Documents, the maturity dates of the Notes were accelerated. Under the power of sale clause in the Mortgage, Huntington began foreclosure proceedings by advertisement pursuant to M.C.L. 600.3201, *et seq*.

15. The foreclosure sale was originally scheduled for November 16, 2012. *See*, **Exhibit 4 – Sheriff's Deed, Pg. 3, Notice of Foreclosure Sale**. However, the sale was not held because the Eviction Defendants filed the Chapter 7 bankruptcy on November 15, 2012.

16. On December 26, 2012, Huntington was granted relief from the automatic stay in the Chapter 7, allowing it to proceed with its foreclosure of the Mortgage. **Exhibit 5 – Order Granting Relief from the Automatic Stay, Chapter 7, Docket No. 20**.

17. Thereafter, on February 20, 2013, the Eviction Defendants received a joint discharge. **Exhibit 6, Chapter 7, Docket No. 31**.

FORECLOSURE OF THE MORTGAGE AND THE *SECOND* BANKRUPTCY FILING TO DELAY EVICTION

18. Following lengthy settlement attempts, the foreclosure sale was held on August 16, 2013. *See*, **Exhibit 4**.

19. Pursuant to M.C.L. 600.3240(8), there was a six-month redemption period following the foreclosure sale, and thus was to expire on February 18, 2014.[1] However, on February 17, 2014, Mrs. Gorges filed the Hana Gorges Bankruptcy.

20. Mrs. Gorges did not file the requisite documents to maintain her case, or otherwise show cause why she was entitled to relief from this Court, having received a discharge in the Chapter 7 roughly one year before, and the Hana Gorges Bankruptcy was dismissed on March 4, 2014. **Exhibit 7, Hana Gorges Bankruptcy, Docket No. 19**. It is clear from reviewing the docket alone that Mrs. Gorges filed the Hana Gorges Bankruptcy with no intention of ever prosecuting it.

THE EVICTION CASE, THE EVICTION DEFENDANTS' FAILURE TO MAKE MONTHLY ESCROW PAYMENTS, AND THE THIRD BANKRUPTCY FILING TO FURTHER DELAY THE EVICTION

21. Huntington filed a Summary Proceeding against the Eviction Defendants when they failed to redeem and/or vacate the Real Property in the 41-A District Court of Michigan (the "Eviction Court"), Case No. US14-00927-LT.

22. On April 2, 2014, at the initial summary proceeding hearing, the Eviction Defendants were ordered to pay $1,866.66 within seven days and then $2,000 per month beginning on May 1, 2014, until further ordered by the Court. **Exhibit 8 – Escrow Order**. *The Eviction Defendants did not make a single payment.*

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[1] The redemption period was extended by two days, as February 16, 2014 was a Sunday, and February 17, 2014 was Presidents' Day, a national holiday.

23. Following multiple motions, depositions of Huntington, the Eviction Defendants, and Christ Gorges and Krystal Gorges (the children of the Eviction Defendants), a settlement was reached on the day of trial, December 10, 2014. The Eviction Defendants, and/or their children, sought to repurchase the Real Property. The terms of the proposed repurchase were placed on the record in the Eviction Court and a written order was entered evidencing its terms. **Exhibit 9 – Settlement Agreement** (the "Settlement").

24. Pursuant to the Settlement, among other requirements, the Eviction Defendants were required to tender $20,000 to Huntington before December 17, 2014 at 5:00 p.m., with the balance to be paid before February 9, 2015. *Id.* In the event that either payment was not made, Huntington's counsel could release the Consent Judgment, from escrow, and have it entered with the Eviction Court. *Id.*

25. Pursuant to the Settlement, Huntington inspected the Real Property on December 10, 2014 and took photographs throughout. **Exhibit 10**. The photographs show that the Real Property was in excellent condition and was being well maintained. *Id.*

26. The Settlement also provided that: "Defendants agree that the house will be in the same condition or better upon vacancy, if they do not tender the final payment." *See*, **Exhibit 9**.

27. The $20,000 payment was not remitted as required under the Settlement. Instead, the Debtor filed this petition for chapter 13 bankruptcy relief on December 17, 2014, the third venture by the Debtor or his wife into the Bankruptcy Court in 25 months.

THE COURT'S ORDER EXTENDING THE DEBTOR'S DEADLINE TO PAY SETTLEMENT FUNDS AND THE DEBTOR'S FAILURE TO PAY

28. Pursuant to the Settlement, the Eviction Defendants were required to pay a total amount of $410,000 (the "Settlement Funds") to repurchase the Real Property. *Id.*

29. Following the hearing of Huntington's Motion for Relief from Stay held on January 15, 2015, this Court issued its Order Granting in Part, and Denying in Part, Motion by Huntington National Bank for Relief from Stay ("Order on Motion"). **Exhibit 11, Docket No. 31**.

30. The Order on Motion provided the Eviction Defendants until February 17, 2015 to tender the Settlement Funds. *Id.*

31. Not surprisingly, the Eviction Defendants failed to tender the Settlement Funds.

32. Pursuant to the Order on Motion, on February 18, 2015, Huntington filed its Affidavit of Non-Compliance (Docket No. 38) and this Court entered its Order Granting Relief from the Automatic Stay related to the Real Property. **Exhibit 12, Docket No. 39**.

THE ENTRY OF THE JUDGMENT FOR POSSESSION OF THE REAL PROPERTY, DISCOVERY OF THE EXTENSIVE DAMAGE TO THE REAL PROPERTY AND THE SALE OF PROPERTY OF THE BANKRUPTCY ESTATE

33. Huntington returned to the Eviction Court and the Consent Judgment was entered on February 24, 2015. **Exhibit 13**.

34. On February 27, 2015, before a court officer from the Eviction Court could execute on the Order of Eviction (that was subsequently entered), Huntington learned of extensive damage to the Real Property. **Exhibit 14 – Photographs taken by Huntington representative on 2/27/15**. The photographs demonstrate incredible and extensive damage to every room of the house and the theft and/or conversion of numerous items, including but not limited to: exterior light fixtures, combination oven and microwave, in-cabinet oven, gas cook-top, dishwasher, refrigerator, numerous interior light fixtures, washer and dryer, vanity cabinets, sinks, faucets, granite counter-tops, kitchen cabinets, and hood-vent. *Id.* It also appears that a sledge-hammer was used on every wall, door, counter, etc. throughout the house. *Id.*

35. Adding insult to injury, included with the extensive damage to the Real Property was this quote found on one of the walls in the house: "F**K YOU THE HOUSE WAS PAID OFF YOU TOOK IT FROM US". It appears that this was written on the wall using vinegar or bleach, so it is difficult to photograph. However, Huntington will supplement with additional photographs if it is able.

36. Huntington also learned that the electricity was turned off at the request of the customer on February 16, 2015, the gas/heat was turned off on February 20, 2015 due to lack of payment, and the water was turned off at the request of the customer on February 18, 2015. None of the Eviction Defendants, their children, or their counsel ever notified Huntington of these actions, thus further escalating the likelihood of severe damage to the Real Property given the routine sub-zero temperatures.

37. Huntington also learned that an estate sale was conducted at the Real Property in January 2015, for three days, beginning the day after the parties were before this Court on Huntington's motion for relief from stay, where the Eviction Defendants were apparently selling property of the bankruptcy estate. **Exhibit 15 – Advertisement for Estate Sale.** The advertisement lists the following property being sold: "Beautiful show room condition furniture Queen Bedroom Set King Bedroom Set Living Room Set Dining Set Library Desks Appliances including Washer & Dryer, Refridgerators [sic] & Stove."[2] *Id.*

38. Similar, if not identical, property was scheduled by the Debtor in Schedule B. **Exhibit 16, Docket 18, Pg. 4 of 32.**

39. The Court should note that the sale was conducted during the pendency of this matter, but before the Debtor testified at the 341 hearing, which, not surprisingly, never occurred.

[2] Photographs from the estate sale advertisement were not available on the website.

THE DEBTOR'S FAILURE TO ATTEND THE § 341 MEETING OF CREDITORS, THE TRUSTEE'S MOTION TO DISMISS BANKRUPTCY CASE, AND HUNTINGTON'S OBJECTION

40. The § 341 Meeting of Creditors was scheduled for February 3, 2015, but the Debtor failed to appear; the Debtor had filed a motion to adjourn, but the pleading was stricken by the Court (Docket No. 25).

41. The Trustee filed its Motion to Dismiss Bankruptcy Case due to the Debtor's failure to appear. *See*, Docket No. 37.

42. Upon learning of the extensive damage to the Real Property and the unauthorized sale of the property of the bankruptcy estate, Huntington's Objection was filed therein seeking to convert the case to one under chapter 7. *See*, Docket Nos. 40, 41, and 44.

43. *Within hours* of the filing of Huntington's Objection, the Debtor filed his Motion for Voluntary Dismissal of Bankruptcy Case. Docket No. 42.

44. This Court entered the Dismissal within hours of the Debtor's motion, without a hearing or an opportunity for the Trustee or Huntington to respond. *See*, Docket No. 43.

THIS CASE WAS FILED IN BAD FAITH WITH THE INTENT OF ABUSING THE BANKRUPTCY PROCESS, TO FURTHER DELAY THE EVICTION AND FRUSTRATE HUNTINGTON'S LEGITIMATE LEGAL RIGHTS AS A SECURED CREDITOR

45. A debtor's chapter 13 case must be filed in good faith. *See, Alt v. United States,* 305 F.3d 413, 418–20 (6^{th} Cir. 2002); *see also, Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 375 n. 11; 127 S.Ct. 1105, 1111–12 n. 11; 166 L.Ed.2d 956 (2007). While the Sixth Circuit has not espoused exactly what constitutes bad faith, it has instructed that in determining a debtor's good faith, bankruptcy courts should consider the totality of the circumstances. *Alt,* 305 F.3d at 419. Some of the factors which may be considered in the context of dismissal of a chapter 13 petition for lack of good faith are the timing of the petition, how the debt arose, the

debtor's motive in filing the petition, how the debtor's actions affected creditors, and the debtor's treatment of creditors both before and after the petition was filed. *Id.* "Because good faith is an 'amorphous notion' it is impossible to identify the 'infinite variety of factors' that might weigh in the 'good faith equation." *Condon v. Brady,* 358 B.R. 317, 326 (6th Cir. 2007) (citing *Metro Employees Credit Union v. Okoreeh-Baah,* 836 F.2d 1030, 1033 (6th Cir. 1988)).

46. Under Sixth Circuit law, there is no particular test for determining whether a bankruptcy petition was filed in good faith. Good faith is evaluated "under flexible and multiple standards," and is determined on an ad hoc basis. *In re Charfoos*, 979 F.2d 390, 393 (6th Cir. 1992); and *In re Zick*, 931 F.2d 1124, 1129 (6th Cir. 1991).

> "Taken literally and exclusively, like *Winshall*, [the *Zick*] language arguably might confine the Sixth Circuit's idea of bad faith to more limited circumstances than those relied on by other courts. Such an interpretation would be at odds with the seemingly universal concept (to which the Sixth Circuit also adheres) that good or bad faith is a uniquely factual matter in which the required showings are as varied as the number of cases in which the issue is raised. *Zick* and *Winshall* in the end must be considered in light of the facts in those cases, despite the arguably restrictive language used to dispose of the issue in those cases. **Therefore, the Court concludes it may consider any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions,' in particular, facts which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.'** (Emphasis added). *Id.*, at 716.

Further, a key inquiry, however, is whether the debtor is seeking to abuse the bankruptcy process. *Alt,* 305 F.3d at 419.

47. While multiple filings are not, in and of themselves, improper or indicative of bad faith, a history of multiple filings and dismissals may be construed as bad faith. *In re Glenn,* 288 B.R. 516, 520 (Bankr. E.D. Tenn. 2002). Additionally, while filing on the eve of, for example, a foreclosure or, as in this case, a debtor's examination is not necessarily an indication of bad faith, it is probative of bad faith. *See, Id.*

48. Here, the Eviction Defendants' historic conduct demonstrates that this case was filed in bad faith, solely to delay and frustrate Huntington's legitimate efforts to recover possession of the Real Property. For example:

A. The Eviction Defendants filed the Chapter 7 one day before the originally scheduled foreclosure sale to delay the foreclosure;

B. Mrs. Gorges then filed her second bankruptcy case exactly one year after she received a discharge, *one day before the redemption period expired*, in order to delay the eviction. The docket report clearly demonstrates that Mrs. Gorges had no intent of prosecuting her bankruptcy case: she failed to file the majority of the required documents, never made attempts to correct these deficiencies, and she never responded to the Court's Order to Show Cause Why Debtor is Entitled to a Discharge (Docket No. 9). Quite telling, during Mrs. Gorges' deposition, she testified that she had not incurred any new debts that she was seeking to discharge, but instead she filed her second bankruptcy petition simply because her attorney told her to file it (**Exhibit 17 - Hana Gorges Deposition Transcript, Pgs. 8-10)**;

C. The Eviction Defendants repeatedly violated the Eviction Court's Escrow Order and never made a single payment thereunder;

D. The Eviction Defendants delayed the eviction proceedings by demanding dates in the scheduling order that were convenient for their counsel and then failed to comply with the dates they selected, which resulted in delayed and additional hearings;

E. The Eviction Defendants' delayed filing their Motion to Adjourn Trial for six weeks in order to further delay the eviction proceedings;

F. Despite living in the Real Property without payment on the Notes for years, while claiming to be the rightful owners of the Real Property, the Eviction Defendants also failed to pay the taxes or the related home-owners association dues assessed against the Real Property (**Exhibit 18 - statements of delinquent Real Property taxes and homeowner's association dues**);

G. The Eviction Defendants entered into the Settlement to "resolve" the eviction case with no apparent intention of ever complying with its terms;

H. The Debtor filed the instant bankruptcy case on the day that the Eviction Defendants were required to tender the $20,000 payment to Huntington;

I. The Debtor failed to disclose all of his income; in his Statement of Financial Affairs, *he did not list any income* for the past two years. Docket No. 18, Pgs. 19-20. However, the Debtor's son, Christ Gorges, testified at his deposition that he gives his parents $2,500 per month and the Debtor's daughter, Krystal Gorges, testified at her deposition that she pays all of her parents' utility bills. **Respectively, Exhibit 19, Christ Gorges' Deposition Transcript, Pgs. 28-29; Exhibit 20, Krystal Gorges' Deposition Transcripts, Pgs. 21-22.** The Debtor's Schedule J shows monthly utilities in the amount of $833.00. Docket No. 18, Pgs. 17-18. Collectively, for the two years prior to the petition date, the Debtor had income of at least $39,996.00 from his children – yet he failed to list any of this income.

J. The Debtor failed to appear at the § 341 Meeting of Creditors;

K. The Debtor failed to respond to the Court's Order to Show Cause Why Debtor is Entitled to a Discharge. *See*, Docket No. 9.

L. The Debtor sold property of the bankruptcy estate without the permission of the Trustee or this Court or notice to creditors; and

M. The Debtor, or those acting on his behalf, caused extensive damage to the Real Property, presumably at the time it was still property of the bankruptcy estate.[3] The Debtor's destruction of the Real Property was also a violation of the explicit terms of the Settlement.

49. Collectively, it is quite plain that the Eviction Defendants took all necessary steps to live in the Real Property for free as long as they possibly could. The Debtor clearly demonstrated that he had no intent of prosecuting this bankruptcy case. Instead, the Debtor and his family abused the Eviction Court process and the bankruptcy process, and used both courts as tools to accomplish these repeated delays. The Eviction Defendants took this even further by selling property of the bankruptcy estate and extensively damaging the Real Property.

THE DISMISSAL SHOULD BE SET ASIDE TO PREVENT THE DEBTOR'S MISCONDUCT AND ABUSE OF THE BANKRUPTCY PROCESS AND TO PREVENT A MANIFEST INJUSTICE TO HUNTINGTON

50. The bankruptcy court has the authority to take any necessary action to ensure that debtors do not abuse the bankruptcy process. 11 U.S.C. § 105(a) states:

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[3] It is safe to presume that the Debtor, and/or his family or those acting on their behalf, damaged the Real Property before they moved out. Given that the electricity was turned off on February 16, 2015, the Debtor moved from the Property prior to this date. The Real Property remained an asset of the bankruptcy estate until February 18, 2015, when the Court issued its Order Granting Relief from the Automatic Stay related to the Real Property. *See*, **Exhibit 12, Docket No. 39**.

> "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. **No provision of this title** providing for the raising of an issue by a party in interest **shall be construed to preclude the court from**, sua sponte, **taking any action or making any determination necessary or appropriate** to enforce or implement court orders or rules, or **to prevent an abuse of process**." (Emphasis added).

Moreover, a bankruptcy court has the "equitable power and the duty to 'sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.'" *In re Multiponics, Inc.*, 622 F.2d. 709, 714 (5th Cir. 1980) (quoting *Pepper v. Litton*, 308 U.S. 295, 308; 60 S.Ct. 238; 84 L.Ed. 281 (1939)).

51. In addition, Fed. R. Civ. P. 60(b)(3) states:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

Rule 60 applies in bankruptcy cases pursuant to Fed. R. Bank. P. 9024.

Under Rule 60(b), relief is properly granted where the movant "'show[s] that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding [in] question." *In re Bellanti*, 476 B.R. 504, 511 (E.D. Mich. 2012), quoting *Info-Hold, Inc. v. Sound Merchandising, Inc.*, 538 F.3d 448, 455 (6th Cir. 2008). The scope of "misconduct" as used in Rule 60(b)(3) is necessarily of a "wider scope than fraud or misrepresentation lest it be redundant." *Thomas v. City of New York*, 293 F.R.D. 498 (S.D. N.Y. 2013), citing *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) ("For the term to have meaning in the Rule 60(b)(3) context, it must differ from both 'fraud' and 'misrepresentation.' Definition of this difference requires us to take an expansive view of 'misconduct.'"). Failure to disclose or produce material requested in discovery, and a material witness giving false testimony, have both been held to constitute "misconduct" within the purview of Rule 60(b)(3).

See, *Abrahamsen v. Trans-State Exp., Inc.*, 92 F.3d 425, 428 (6th Cir. 1996). These are merely examples, and are not exclusive, of "misconduct" warranting relief from a judgment or order.

52. Huntington's requested relief is also proper under Fed. R. Civ. P. 59(e), which states: "A Motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." This time-line is shortened to 14 days under Fed. R. Bank. P. 9023.

53. The Debtor's, and his family's, historic misconduct is strikingly similar to the debtor in *Cusano v. Gene Klein*, 431 B.R. 726 (6th Cir. 2010). Cusano, a former guitarist for the band KISS, used many of the same abusive tactics as the Debtor to delay legal proceedings with the remaining band members (the "Band Members"). In *Cusano*, the Band Members obtained a judgment (outside of bankruptcy) against Cusano and scheduled a post-judgment examination of Cusano. Days before the scheduled examination, Cusano filed a petition for chapter 13 bankruptcy relief thus cancelling the judgment examination. Cusano did not complete his budget and credit counseling and his petition was dismissed shortly thereafter. The Band Members continued prosecuting their judgment against Cusano and Cusano then filed a second chapter 13 petition. The Band Members moved to convert the case to one under chapter 7 and, in response, Cusano moved to voluntarily dismiss the petition and a dismissal was entered.

The Band Members then moved (outside of bankruptcy) for permission to sell Cusano's copyrights to satisfy their judgment; however, days before the motion hearing, Cusano filed his third petition for relief under chapter 13. Cusano failed to appear at the first meeting of creditors. The Band members then moved to convert the case to one under chapter 7. Cusano then filed a Notice of Voluntary Dismissal. The Band Members filed an objection to the Notice of Voluntary Dismissal based upon Cusano's bad-faith bankruptcy filings, his failure to disclose a legal malpractice suit, and his failure to disclose his receipt of income through royalties.

However, the bankruptcy court entered an order of voluntary dismissal on the same day the Notice was filed, without hearing the Band Members' objection.

Citing Fed. R. Civ. P. 59(e) and 11 U.S.C. § 105, among other authority, the *Cusano* bankruptcy court found that Cusano:

> "**had acted, and was continuing to act, in bad faith**. The **court based its finding upon many factors, including, but not limited to, the fact that the Debtor filed three petitions for relief in three years, the timing of the filing of, and dismissal of, the petitions relative to the California litigation and the Appellees' motions to convert**, the actions taken by the Debtor pro se despite his representation by counsel, his failure to follow advice of counsel, **and his failure to disclose a significant claim for compensatory damages**." (Emphasis added). *Id.*, at 735.
>
> * * *
>
> "The Debtor's conduct in prosecuting his bankruptcy cases only when it suits him is indicative of a bad faith attempt to frustrate the Appellees' efforts to collect on their judgment lien and constitutes an abuse of the bankruptcy process." *Id.*, at 738.

Ultimately, the bankruptcy court amended the dismissal order and prohibited Cusano from re-filing for chapter 13 protection for two years and further ordered that any future bankruptcy filing would have no impact or interference, through the automatic stay or otherwise, upon the pending litigation with the Band Members. The Sixth Circuit affirmed this ruling.

54. With the exception of the instances where Cusano was acting *in pro per*, all of the other elements of bad-faith from *Cusano* apply to the instant case:

A. Cusano filed three bankruptcy petitions within three years. The Eviction Defendants filed three bankruptcy petitions in 25 months;

B. Cusano had a history of filing his bankruptcy petitions on the eve of significant creditor action. The Eviction Defendants filed their first bankruptcy one day before the first scheduled foreclosure sale, their second bankruptcy one day before the expiration of the redemption period, and their third bankruptcy on the day their $20,000 payment was due in order to prevent entry of the Consent Judgment;

C. Cusano and the Debtor both moved to voluntarily dismiss their bankruptcy cases only after their respective creditors had sought to convert the cases to ones under chapter 7; and

D. Cusano failed to disclose a legal malpractice claim and income from royalties. The Debtor failed to disclose income from his children.

55. In addition to the identical badges of bad-faith of *Cusano*, the Debtor's conduct is even worse. The Debtor filed this case knowing, and previously testifying, that he did not have the Settlement Funds (thus the bankruptcy filing could have served no purpose other than delay), he sold property of the bankruptcy estate without the authorization of the Trustee or the Court (*see*, *In re Corum, IV*, 2012 WL 5514790, *7 (Bankr. E.D. Va. 2012) (conversion of chapter 13 to chapter 7 was warranted where debtor sold real property of the bankruptcy estate without authorization: "[i]t is universally accepted that the terms of a proposed sale not in the ordinary course must be disclosed to the Court and to all creditors and parties in interest"), and he destroyed the Real Property and converted many of the items and fixtures within the Real Property. The vulgar quote that the Debtor left on the wall of the house is emblematic of his, and his family's, misconduct since foreclosure proceedings commenced.

56. Because the Debtor's conduct is significantly worse than that in *Cusano*, additional consequences are appropriate beyond a bar to re-filing and a ruling of no interference should a future case be filed. This Court should also set aside the Dismissal and convert the case to one under chapter 7 (for the reasons set forth herein and in Huntington's Objection).

57. "A court may reconsider a previous judgment under Rule 59(e) to accommodate an intervening change in controlling law, to account for newly discovered evidence, to correct a clear error of law, or to prevent manifest injustice." *Cusano*, 431 B.R. at 734; citing *J & M Salupo Development Co. v Fifth Third Mortgage Company*, 388 B.R. 795, 805 (6th Cir. 2008).

* * *

> "A movant seeking Rule 59(e) relief must be able to show an error in the trial court that is direct, obvious, and observable. The movant must also be able to demonstrate that the underlying judgment caused them some type of serious injustice which could be avoided if the judgment were reconsidered. Essentially, the movant must be able to show that altering or amending the underlying judgment will result in a change in the outcome in their favor. A party may not seek Rule 59(e) relief on the premise of 'manifest injustice' if the only error the movant seeks to correct is a poor strategic decision."

58. If the Dismissal is permitted to stand, the Debtor's misconduct, abuse, and gamesmanship will be permitted to stand and, essentially, will be endorsed as acceptable conduct by this Court. The Dismissal permits the Debtor to use the bankruptcy stay as a shield *and a sword* while he had no intention of prosecuting this case. The Debtor obtained the benefit of the bankruptcy stay by:

A. Receiving an additional 60 days to pay the Settlement Funds (despite his testimony that he never had the money to begin with – and likely never intended to pay);

B. Delaying the entry of the Consent Judgment by at least 60 days;

C. Living in the Real Property for free for at least another 60 days; and

D. Stopping Huntington's legal rights and remedies, while at the same time the Debtor was selling and destroying property of the bankruptcy estate.

If the Dismissal stands, the Debtor will have received these benefits and Huntington will be left with a destroyed house and thousands of dollars in legal fees incurred as a direct result of the

Debtor's misconduct. A likely result would be Huntington filing a lawsuit, seeking damages for the destruction of the house, only to be followed by yet another bankruptcy filing.

59. If the Dismissal is set aside, the Debtor's misconduct can be fully investigated by the Trustee, Huntington, and this Court. An investigation can be made as to the scope and value of the estate property sold without authorization, whether any other concealed property transfers took place, and the scope and value of the damage to the Real Property. Critically, the Debtor will be required to account for his misconduct – but only if the Dismissal is set aside. Setting aside the Dismissal is imperative to avoid a manifest injustice that Huntington, and this Court, will otherwise suffer. As the court in *Cusano* found a manifest injustice, so too should this Court.

THE DEBTOR'S COUNSEL SHOULD BE SANCTIONED FOR HIS ROLE IN THE EVICTION DEFENDANTS' DILATORY AND ABUSIVE CONDUCT

60. The conduct of the Debtor's attorney, Stuart Sandweiss, who represented Mrs. Gorges in the Hana Gorges Bankruptcy and represents the Debtor in the instant bankruptcy, is indivisible from the Eviction Defendants' misconduct and renders him personally liable for the payment of excess costs, expenses, and attorney fees under 28 U.S.C. § 1927. That statute provides, in pertinent part:

> Any attorney…who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The purpose of § 1927 is to deter dilatory litigation practices. *Jones v. Continental Corp.*, 789 F.2d 1225, 1230-31 (6th Cir. 1986). As explained in *In re Ruben*, 825 F.2d 977, 983 (6th Cir. 1987), "the section is designed as a sanction against dilatory litigation practices and is intended to require an attorney to satisfy personally the *excess* costs attributable to his misconduct."

61. Without question, attorney Sandweiss' conduct in conjunction with the multiple bankruptcy proceedings, filed as mere dilatory tactics, supports a sanction against him for misconduct. An award of attorney fees and costs is warranted under § 1927 "when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.'" *Bailey v. Papa John's USA, Inc.*, 236 Fed. Appx. 200 (6th Cir. 2007), citing *In re Ruben*, 825 F.2d at 984. Importantly, because § 1927 imposes an objective standard of conduct on attorneys, *a court need not find that an attorney acted in subjective bad faith to sanction him under § 1927. Jones, supra*, at 1230-31; *In re Ruben, supra*, at 984. "Instead, a district court may impose liability for attorney fees under section 1927 when it determines that 'an attorney reasonably should know that a claim pursued is frivolous.'" *Bailey, supra* at 204, quoting *Jones, supra.* Stated another way, all that is required is a showing of "some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *In re Ruben, supra*, at 984.

62. In *Villareal v. Villareal*, 46 B.R. 284 (C.D. Cal. 1984), a substantially similar case, the bankruptcy court held that sanctions were warranted against both the debtor and his attorney for multiple bankruptcy petitions filed merely to stay foreclosure on real property. In *Villareal*, the debtor had filed two previous chapter 13 petitions, one in September 1983 and another in November 1983, with the assistance of the same counsel (attorney Gomez). The first of these chapter 13 petitions was filed in order to stop plaintiff National Home Equity Corporation from foreclosing on the debtor's residence. That case was dismissed at the confirmation hearing less than two months after it was filed. Just over one week later, the debtor

filed his second chapter 13 petition, again with the assistance of attorney Gomez. That case was dismissed two months later pursuant to 11 U.S.C. § 1307(c) for failure to appear at the meeting of creditors. *Id.* at 285. One day prior to plaintiff's foreclosure sale (and only four months after his second chapter 13 case was dismissed), attorney Gomez filed, on behalf of the debtor, a chapter 7 petition. The schedules confirmed that the debtor had no unsecured debts. Much like this case, as admitted by Mrs. Gorges during her deposition, the debtor in *Villareal* indicated that he had acted upon attorney Gomez's advice in filing the chapter 7 bankruptcy in order to delay the foreclosure, despite the previous filings and lack of unsecured debts. *Id.*

Citing 28 U.S.C. § 1927 and Fed. R. Bankr. P. 9011 (which requires the signatory of a document to certify that it is not interposed for any improper purpose, such as to cause delay, and authorizes sanctions for violation of same), the *Villareal* Court sanctioned both the debtor and his attorney Gomez. *Id.* at 285-286. In so doing, the *Villareal* Court stated that this case was emblematic of "a particularly serious problem for the judicial process" created by the filing of multiple bankruptcy petitions solely to invoke an automatic stay. *Id.* at 285. "As officers of the Court, counsel owe a duty to the judicial system not to abuse it." *Id.* The *Villareal* Court held that attorney Gomez had abused the system in a manner warranting sanctions:

> "The filing of this Chapter 7 case, after filing two Chapter 13 cases for the sole purpose of delaying foreclosure, was an abuse of the bankruptcy process which warrants the awarding of sanctions against both the debtor and his attorney. A particularly flagrant aspect of the case is that the debtor will derive no benefit from the case, other than temporarily delaying the plaintiff's foreclosure, because debtor has no creditors with unsecured claims." *Id.* at 286.

Numerous other bankruptcy and district courts, including the Eastern District of Michigan, have similarly imposed costs, expenses, and attorney fees against a debtor's counsel under the authority of 28 U.S.C. 1927, Rule 11 of the Federal Rules of Civil Procedure, and Fed. R. Bankr. P. 9011.[4]

63. In addition, Fed. R. Civ. P. 11 and Fed. R. Bankr. P. 9011 provide additional bases for awarding sanctions against attorney Sandweiss. *See*, *In re Perez*, 43 B.R. at 534 ("Section 1927 and Rules 11 and 9011 provide additional bases for awarding sanctions against attorneys who file pleadings and motions for improper purposes and whose conduct thereby unreasonably and vexatiously multiples matters before the Court. Recent opinions of other bankruptcy courts show that improper multiple filings have become all too commonplace.").

64. There are numerous instances demonstrating attorney Sandweiss' misconduct:

A. Attorney Sandweiss commenced his representation of the Eviction Defendants with the filing of the Hana Gorges Bankruptcy. He filed that case knowing that she had received a discharge exactly one year prior, she had incurred no new debts, and also knowing that the Eviction Defendants did not have the money to redeem the Real Property or otherwise demonstrate a proper basis or motivation for the petition. He then failed to file all of the necessary documents, failed to attempt to correct those deficiencies, failed to respond to the Court's Order to Show Cause, and simply permitted the case to be dismissed after delaying the eviction;

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[4] *See, e.g., In re Perez*, 43 B.R. 530 (Bankr. S.D. Tex. 1984) (holding that debtors' counsel was liable for attorney fees and expenses incurred by secured creditor in its efforts to recover its collateral in the second and third of the debtors' three successive chapter 13 cases, where the second and third cases were not filed in good faith, but solely to prevent the creditor from foreclosing on its collateral); *Matter of Eck*, 34 B.R. 11 (Bankr. M.D. Fla. 1983) (where debtor's attorney filed a voluntary dismissal of chapter 13 case and thereafter filed a new chapter 13 petition, debtor's attorney was required to reimburse plaintiff for excess attorney fees resulting from his conduct); *Tang v. Putruss*, 2007 WL 2909527 (E.D. Mich 2007) (awarding the plaintiff the attorney fees incurred in preparing a motion to dismiss and reply brief, pursuant to § 1927, given the vexatious "litany of claims" asserted by defendants, which the attorney "knew or should have known" were frivolous); *Pharmacy Records v. Simmons*, 2006 WL 156669 (E.D. Mich. 2006) (imposing sanctions against plaintiffs' counsel under § 1927 where he made baseless claims, nonsensical arguments, and had recently lost a similar argument, and thus fell "short of the obligations owed by a member of the bar.")

B. Attorney Sandweiss required extended dates for the scheduling order in the Eviction Court, then failed to comply with the dates, resulting in additional hearings and further delay of the eviction proceedings;

C. Attorney Sandweiss then filed the instant case, knowing it was the Eviction Defendants' third bankruptcy filing in 25 months and also knowing that the Debtor did not have the money to pay the Settlement Funds. Again, his filings had no proper purpose and resulted in a further delay of the eviction proceedings and significantly increasing Huntington's litigation costs;

D. Attorney Sandweiss knew, or should have known, that his clients could never have paid the Settlement Funds and his representation of them solely delayed Huntington's legitimate rights as a secured creditor to recover its collateral following default upon the underlying Notes.

65. Attorney Sandweiss' conduct has transformed what should have been a routine post-foreclosure eviction into protracted litigation, including two bankruptcy filings in 10 months. If the Dismissal stands, Huntington will be required to litigate in yet another forum to address the damage to the Real Property and the related conversion of fixtures and personal property within the house. All told, Huntington has incurred attorneys' fees and costs in excess of $80,000 in prosecuting this eviction – the vast majority of which could have been avoided had attorney Sandweiss not aided and abetted the Eviction Defendants in their misconduct.

RELIEF REQUESTED

66. For the reasons set forth above, the Dismissal should be set aside and the case should be converted to one under chapter 7 in order to investigate the circumstances surrounding

the sale of property of the bankruptcy estate and damage to the Real Property and, if appropriate, permit adversary proceedings related to this misconduct.

67. Further, the Court should sanction attorney Sandweiss and the Debtor in the amount of $78,000 (Huntington has deducted estimated attorneys' fees and costs for a typical post-foreclosure eviction of $1,500 to $2,000).

WHEREFORE, for the reasons stated above, Huntington respectfully requests that this honorable Court enter an order:

A. Setting aside the Dismissal;

B. Converting this case to a case under chapter 7;

C. Sanctioning attorney Sandweiss and the Debtor in the amount of $78,000 for Huntington's attorneys' fees and costs incurred as a direct result of their conduct;

D. Granting all other relief deemed appropriate under the circumstances.

PLUNKETT COONEY

Dated: March 10, 2015

By: /s/ Marc P. Jerabek

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